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NO. ~~OFFICE~~ OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

THOMAS PIERCE,

Petitioner,

v.

STATE OF OHIO,

Respondent.

On Petition For Writ of Certiorari
To The Ohio Court of Appeals
Eighth Judicial District

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

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COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA
NOS. 66853, 66854, 66855

STATE OF OHIO	:
	:
PLAINTIFF-APPELLANT	:
	: JOURNAL ENTRY
	:
v.	: AND OPINION
	:
THOMAS PIERCE [CASE NO.66853]	:
NAPOLEON DURDEN	:
[CASE NO.66854]	:
NATHANIEL FLOWERS	:
[CASE NO.66855]	:
	:
DEFENDANTS-APPELLEES	:

DATE OF ANNOUNCEMENT OF DECISION: MAY 25, 1995

CHARACTER OF
PROCEEDING:

Criminal appeals from
Common Pleas Court,
No. CR-301570

JUDGMENT:
DATE OF JOURNALIZATION:

REVERSED & REMANDED

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*AUGUST PRYATEL, J.:

Appellant, State of Ohio, appeals from the judgment of the Cuyahoga County Court of Common Pleas which granted the motions to suppress "illegally" obtained evidence filed by appellees, Thomas Pierce, Napoleon Durden and Nathaniel Flowers. Appellant assigns one error for this court's review.

Appellant's appeal is well taken.

I. THE FACTS

On November 2, 1993 appellees, Thomas Pierce, Napoleon Durden and Nathaniel Flowers, were indicted by the Cuyahoga County Grand Jury in a six count indictment for receiving stolen property in violation of R.C. 2913.51; carrying a concealed weapon in violation of R.C. 2923.12; possession of a controlled substance, to-wit: cocaine, in violation of R.C. 2925.03; preparation of a controlled substance for shipment in violation of R.C. 2925.03; use of a motor vehicle for the commission of a felony drug abuse in violation of R.C. 2925.13 and possession of criminal tools in violation of R.C. 2923.24.

On November 24, 1993 Thomas Pierce and Nathaniel Flowers were arraigned whereupon each entered a plea of not guilty to the indictment. On December 8, 1993 Napoleon Durden was arraigned whereupon he also entered a plea of not guilty to the indictment.

Appellees each filed a motion to suppress illegally obtained evidence. On January 7, 1994 the trial court held a hearing on appellees' motions to suppress.

During the hearing, the following facts were developed. On September 1, 1993 the Street Crimes Unit of the Cleveland Police Department was investigating an illegally parked vehicle near the intersection of East 71st Street and St. Clair. The unit suspected that the parked vehicle was involved in the sale and/or transportation of

illegal drugs.

The Street Crimes Unit's main responsibility is the enforcement of the drug laws of the State of Ohio. The unit is comprised of approximately fifteen members who generally deploy themselves in numbers large enough to outnumber and overpower any resistance of people the unit may encounter who are suspected of drug trafficking.

On the date in question, eight members of the unit were investigating an automobile illegally parked from the curb when they observed a second automobile, a 1987 Oldsmobile Cutlass, being driven south along East 71st Street.

Detective Walker of the Street Crimes Unit noticed that one of the passengers in the Cutlass was appellee Nathaniel Flowers whom he had known since childhood. Walker testified that he had received certain information linking Flowers to the sale of the illegal drugs.

Based on Walker's belief, the unit left its investigation of the parked automobile and proceeded to follow the Cutlass. Thomas Pierce was operating the automobile, Flowers was a passenger in the front seat and Napoleon Durden was a passenger in the rear seat.

The unit followed the Cutlass for approximately one-half mile. During this time period, the unit learned through the police computer that the license plates on the Cutlass were not registered to that vehicle (the Oldsmobile) but rather to a 1985 Chevrolet.

With this information, the unit stopped the Cutlass, ordered all of the occupants out of the car and conducted a pat-down search on all three individuals. Detective Petrovich, another member of the unit, testified that (1) he was concerned for his safety due to the nature of the neighborhood as a high crime area and (2) the license plate did not correspond with the vehicle in question. The trial court found that after the vehicle was stopped, the police

removed Thomas Pierce's wallet containing over \$900 in cash and a pager to receive messages, which were immediately placed on the front hood of the automobile.

After the occupants had been searched, the police questioned Pierce as to the ownership of the vehicle. At this point, Pierce produced an Ohio driver's license in the name of Robert Hale. Pierce later explained that he was a fugitive from the State of Pennsylvania and was trying to evade apprehension and extradition. Pierce told the police that the automobile belonged to his girlfriend Fransheria Cannon and that there was sufficient proof of ownership for the vehicle in the glove compartment.

Upon checking the glove compartment, Detective Petrovich testified that he could not find evidence of ownership. Petrovich stated: "The only thing I did see in the glove box was paperwork from a thirty day tag, which at the time held no relevance because there was no thirty day tag on the car." (Tr. 21, lines 20-26.)

In a further effort to establish ownership of the vehicle, the unit entered the vehicle identification number (VIN) into the police computer. The police computer had no information on file under the vehicle identification number. At this point, Detective Petrovich testified that the police proper procedure under the circumstances is as follows:

The first thing is to impound the car. You find if there is any documentation in the car. If there is nothing proving ownership or who owns this car, you have to impound the car.

(Tr. 106, lines 8-11.)

Detective Walker testified at length that he too searched the vehicle for documentation to prove ownership of the vehicle. On direct, he responds as follows:

Q. To whom did you speak?

A. I spoke to Thomas Pierce.

Q. What did you talk to Mr. Pierce about?

- A. I informed Mr. Pierce that his--that the vehicle he was driving had been pulled over because the plates did not come back listed to the vehicle.
- Q. What did he say, if anything, in response to that statement?
- A. He stated that the vehicle was in fact a girlfriend [']s of his and that documentation as to such was in the vehicle.
- Q. What did you do when he informed you of that?
- A. I asked him if I could look in the vehicle for the documentation.
- Q. What did he say?
- A. He complies (sic) and said I could look.
- Q. At that point did you do anything in order to determine the ownership of the vehicle?
- A. Yes, I did.
- Q. What did you do?
- A. I went to the vehicle and I searched the compartment, the driving compartment, in search of some kind of documentation that would show that the vehicle belonged to, in fact, who the defendant said it was.
- Q. Where do you specifically recall searching?
- A. I looked inside of the glove box.
- Q. Did you find anything in the glove box that would indicate to you, ownership, or to whom the vehicle may have

- belonged?
- A. What I found in the glove box was a receipt of some sort for a 30 day tag, and a few cassette tapes.
- Q. Now when you say receipt for a 30 day tag, what do you mean by receipt?
- A. It appeared at the time that this was--it was some kind of duplication of an application or receipt for a 30 day tag for the State of Ohio.
- Q. Do you recall in whose name that receipt was?
- A. I do not recall.
- Q. Was it significant to you, the document, in terms of establishing ownership or registration of that vehicle?
- A. No, sir. It was only the 30 day tag. It wasn't a registration or bill of sale stating that the vehicle belonged to the defendant. Nothing like that.
- Q. So other than that particular document, the receipt, you didn't find any other indicia of ownership to that particular vehicle?
- A. No, sir.
- Q. What did you do at that point in time after you were not convinced or satisfied as to whom the vehicle belonged?
- A. I notified my partner that--my partner, Duane Petrovich, that I did not find anything significant as to the ownership of the vehicle, or something that reflected the defendant was the owner

of the vehicle. It was during this time that a tow sheet had been started up.

Q. By whom?

A. By Detective Petrovich.

Q. What is a tow sheet?

A. A tow sheet is a documentation that the Cleveland police uses for our tow unit. It has on it the VIN number of the vehicle, date and time of a request for tow and various other lines that would indicate ownership or who was driving the vehicle at the time of the tow.

Q. Is any other document filled out in conjunction with the tow sheet?

A. In this case, whereas the vehicle was being towed because of fictitious plates, there would also have been--there also exists a section on the tow sheet where you would write down the ticket number and the violation number, along with the muny (sic) code number.

Q. Now when a vehicle is towed in such a circumstance, is there any accounting done of the contents of the vehicle?

A. In all circumstances of a tow, an itemized list of the property within the vehicle has to be documented for not only the safety--or not only the safety of the police officers, but to secure any property that could possibly have been in the vehicle of the owner or the driver of the vehicle.

Q. Is there a particular name for this itemized list?

A. It (sic) a property inventory list.

Q. Who at the scene was responsible for compiling the property inventory?

A. The property inventory was done at this time by myself and Detective McCauley.

Q. Detective Walker, handing you State's Motion Exhibit 1 for identification purposes, would you take a look at that and tell me whether or not you recognize the document?

A. Yes, I do recognize it.

Q. What is that document?

A. That is a Cleveland Police Department Vehicle Tow Authorization Sheet, or duplication of such.

Q. Is that the tow sheet relating to the vehicle that you stopped that particular day?

A. Yes, sir.

Q. Now did you fill out any part of that document?

A. No, I did not.

Q. Do you recognize any of the officers' handwriting from your particular unit on that document?

A. Yes.

Q. Whose handwriting do you recognize?

A. I recognize Detective McCauley's handwriting, and also Detective Petrovich's handwriting.

Q. Now after Detective Petrovich had started the tow sheet, what did you do at that point in time?

A. I remember speaking with the defendant one time before I walked

back to the vehicle, and he stated there was some sort of documentation in the vehicle that would prove who the vehicle belonged to. I asked him again, can I look in the vehicle? And he said, yes.

* * *

Q. Where else did you look further in the vehicle?

A. Well, I looked into the glove box again to see if I overlooked anything, and I looked in various door[s]--within the doors and the seats and things like that, all in the front part of the vehicle. I did not notice anything that would pertain to ownership of the vehicle.

Q. Now at this point in time, were either Detective Petrovich or Detective McCauley involved in inventorying the vehicle?

A. Yes. Detective McCauley was assisting me with--well, she was assisting Detective Petrovich with an inventory of the vehicle while I was still looking for some sort of documentation to prove ownership.

Q. Now during Detective McCauley's inventorying the vehicle, did she find anything, to your knowledge?

A. Yes, sir.

Q. What did she find, to your knowledge?

A. Detective McCauley came upon a loaded .380 automatic. It was underneath the rear right floor mat of the vehicle.

Q. After she located that weapon, what happened with the three occupants, if anything?

A. It was at this time that all the occupants were placed under arrest and advised of their rights.

* * *

Q. Now subsequent to finding that weapon, did you look any further in the vehicle for evidence of ownership?

A. Yes, sir.

Q. Where did you look?

A. I looked further. I looked--gave a more intense search to the front part of the vehicle, and when it was determined there was no--when I determined, myself, there was nothing else that I could search for, nothing else that I could find that I hadn't already discovered, and this tow sheet had been started up and we are going to tow the vehicle because of the gun, I decided I should assist Detective McCauley with a more thorough inventory of the vehicle.

Q. Now you said because you were going to tow the car because of the gun. I thought you were going to tow the car regardless of the gun?

A. Well, yes. Excuse me. We do--we were going to tow the car because of the fictitious plates and we were more emphasized on towing the car because we found the gun. We placed the three occupants under arrest because of the

- gun.
- Q. At that point in time after the gun was located, they were not free to leave?
- A. No, sir.
- * * *

BY MR. SHELDON:

- Q. They had been placed under arrest at that point?
- A. Yes, sir.
- Q. Did you personally find anything of evidentiary value upon searching further in the vehicle?
- A. Yes, sir.
- Q. What did you find?
- A. I went into the trunk of the vehicle and it was discovered by myself at that time, a black hip pouch.
- Q. How were you able to get inside the trunk?
- A. I used the keys from the key ring, from the vehicle.
- Q. Can you describe what the black pouch looked like?
- A. It was a black hip pouch. They are commonly used to carry items that are a little larger for your wallet and you just don't want to have in your hand. It's a convenience. It's like a purse.
- Q. How does it fasten to the hip area?
- A. I'm unaware of that.
- Q. Did this particular pouch have a zipper or any type of lock?
- A. Yes. It had a zipper on it.
- Q. Where was the hip pouch situated in the trunk area?

- A. It was on the left side of the trunk in plain view.
- Q. Was the pouch opened or closed when you observed it in the trunk?
- A. It was open, sir.
- Q. Did you see anything inside the pouch, in the open pouch, when you looked at it?
- A. Yes.
- Q. What did you see?
- A. I saw a plastic bag.
- Q. Did you see anything inside the plastic bag?
- A. Yes, upon further examination of it, yes, I did.
- Q. What did you see?
- A. I pulled the plastic bag out and I discovered it to be a bag of--filled with suspected crack cocaine, and there was other bags of similar standard in there, and each bag I pulled out, each bag contained further contraband. Some bags had suspected crack cocaine and other bags had suspected powder cocaine.
- Q. Detective Walker, handing you what's been marked for identification purposes as State's Motion Exhibit 3, of which the contents have been removed, can you take a look at that exhibit and tell me whether or not you recognize it?
- A. Yes, I do recognize it.
- Q. What is it?
- A. This is the hip pouch that was in the trunk of the suspect vehicle.

Q. Is there anything different about the hip pouch, as it sits there today, as when you recovered it on this date, on September 1st?

A. It--yes, there is something different about it.

Q. What's different about it?

A. Well, it doesn't contain the suspected narcotics. Also, it has on it now a badge number of the officer who placed it into our property room.

Q. Is the property envelope there that is was placed into?

A. Yes.

* * *

Q. Now, is the--as the hip pouch sits today, was it open as it is now?

A. Yes.

Q. Was the bag protruding at all from it?

A. Yes, the bags were protruding from this area right in the larger compartment.

Q. THE COURT: I wonder if we could make some estimates about this. I would say this bag seems to be maybe 10 inches long across the top, and maybe seven inches high, with two zipper compartments, and there is a large zipper compartment. Then on the outside of the bag there is a separate smaller zipper compartment?

A. THE WITNESS: Yes, sir.

THE COURT: Where is it that you saw the bags protruding out?

THE WITNESS: The bags were protruding from the larger

compartment.

* * *

Q. Detective Walker, upon examining further the plastic baggies, what did you do, if anything, at that point in time?

A. I notified Detective McCauley, initially, of my discovery, and then I notified the other members of the Street Crimes Unit of my discovery.

Q. Based on your training and experience, what did you suspect the plastic baggie to contain?

A. I suspected several of the bags to contain suspected crack cocaine, and the other bags to contain suspected powder cocaine.

Q. How many bags, in total, do you recall confiscating?

A. I don't recall how many total bags there were.

Q. But all the baggies that you recovered were located inside the leather hip pouch.

A. Yes. Inside the larger compartment of the hip pouch.

Q. Now you mentioned earlier that Detective McCauley had located a weapon in the vehicle.

A. Correct.

Q. How were you alerted to this fact?

A. She told me.

Q. Do you recall what she stated to you when she found the weapon?

A. She said I found a gun. There is a

- loaded gun here.
- Q. Just so I'm clear, this gun was found after the males had been ordered out of the car and patted down; correct?
- A. That's correct.
- * * *
- Q. Did you, other than finding the suspected cocaine in the trunk, did you locate any other evidence or contraband in the vehicle?
- A. There was no more evidence pertaining to the case or contraband pertaining to the case. There was (sic) personal items in the vehicle that are listed on the inventory list.
- Q. Did you find any other documentation or indicia of ownership in the trunk area?
- A. No, sir.
- Q. Did you remain at the scene until a tow truck arrived?
- A. The vehicle was driven by Detective -- a detective within the Street Crimes Unit, back to the Justice Center where there was a more thorough inventory, and the tow truck was able to pick it up from there.
- Q. Why was this vehicle driven back to the Justice Center.
- A. Well, a more thorough inventory of the vehicle could be done.
- Q. Now did the officers from your unit, the Street Crimes Unit, participate in the more thorough inventory?
- A. Yes, sir.

- Q. Do you know if anything, in addition to what was found at the scene, was recovered upon doing a more thorough inventory?
- A. I don't recall anything additional being found.
- Q. Now, normally if you requested a tow truck to tow a vehicle, wouldn't you wait for the tow truck to arrive and tow the vehicle?
- A. Normally, yes, sir.
- Q. Why wasn't that done in this case?
- A. Well, given the suspected heightness of the stuff with a loaded weapon and the substantial amount of suspected narcotics, we felt that it would be best we take the vehicle back to the Justice Center where it could be more secured for the protection of the defendant, as well as of the officers.
- Q. Now at any time during the stop of this vehicle did the defendant, Thomas Pierce, give you a name of anybody that may be owner of that vehicle?
- A. Yes, he did.
- Q. Do you recall the name he gave you?
- A. As I look[ed] at the tow sheet, he gave a name of Fransheria, I believe her first name was. Cannon is her last name.
- THE COURT: What was the last name?
- THE WITNESS: Cannon.
- * * *
- Q. At any point in time during this vehicle stop, during the inventory and search of

the vehicle, did any of the three defendants make any statements regarding ownership of the contraband that was found in the vehicle?

A. Yes, sir.

Q. Which defendant made the statement.

A. That would be Thomas Pierce.

Q. To whom did he make the statement?

A. He made the statement to myself.

Q. When did he make this statement at the scene?

A. Following his rights being read to him.

Q. What did he state to you regarding the evidence that was found in the car?

A. He stated to me that the suspected narcotics and the weapon that was found in the vehicle was his, and that the other two occupants of the vehicle had absolutely nothing to do with it.

(Suppression Hearing Transcript, pp. 137-154.)

Once the decision was made to tow the vehicle, an inventory search was conducted. Detective Roman, another member of the Street Crimes Unit, testified that an inventory search serves three purposes, to protect the police against charges of theft, to protect an individual's personal property and to aid law enforcement. During the inventory search, the unit discovered a loaded .380 caliber handgun under a rear floor mat and an unzipped pouch containing 111.11 grams of powder which later proved to be crack cocaine in the trunk. Upon discovery of the weapon, all three co-defendants (Pierce, Durden and Flowers) were placed under arrest and advised of their rights.

Pierce (a.k.a. Hale) was also given a ticket at the scene for fictitious plates in violation of Cleveland Municipal

Ordinance 435.09(F):

- (f) No person shall park or operate any vehicle upon any public street or highway upon which are displayed any license plates not legally registered and issued for such vehicle, or upon which are displayed any license plates that were issued on an application for registration that contains any false statement by the applicant. (Ord. No. 2822-89. Passed 3-19-90. eff. 3-22-90)

The hearing concluded on January 11, 1994. On January 27, 1994 the trial court granted appellees' motions to suppress illegally obtained evidence. The trial court's ruling incorporated the findings of fact and of law made on the record at the conclusion of the suppression hearing.

The trial court found that the traffic violation, fictitious plates, was used as a justification for stopping and searching appellees and the vehicle for the presence of illegal drugs. The trial court stated:

The evidence that the police possessed at the time of the search was inadequate to resolve whether the Cutlass was improperly licensed.*** At the same time, the police had information which could have led them to calling either the dealer that sold the car to Ms. Cannon or Ms. Cannon herself. Those calls could have confirmed that the license which was on the Cutlass had been properly placed there in a good faith effort to

conform with R.C. 4503.12(C).

The trial court ruled that appellant failed to demonstrate by a preponderance of the evidence that, at the time of the stop, the vehicle was improperly displaying a fictitious license plate or that the police had made a good faith effort to determine the validity of the tag on the vehicle.

II. ASSIGNMENT OF ERROR

Appellant's first and only assignment of error states:

THE TRIAL COURT ERRONEOUSLY GRANTED THE DEFENDANTS': THOMAS PIERCE, NAPOLEON DURDEN AND NATHANIEL FLOWERS' [SIC], MOTION TO SUPPRESS EVIDENCE.

Specifically, appellant argues that the trial court erroneously concluded that the Street Crimes Unit failed to make a good faith effort to determine the validity of the license plate in question and, without such good faith effort, did not have reasonable cause to believe that the vehicle was improperly licensed or stolen. Appellant maintains further that the police clearly had probable cause to stop the vehicle and acted reasonably by performing a routine and standard inventory of the contents of the vehicle in accordance with departmental policy.

The Fourth Amendment to the United States Constitution and Section 14, Article I of the Ohio Constitution require the police to obtain a warrant based upon probable cause before they conduct a search. However, the warrant requirement is subject to a number of well-established exceptions. *Coolidge v. New Hampshire* (1971), 403 U.S. 443, 91 S.Ct. 2022.

An inventory search of an impounded vehicle is a well-defined exception to the warrant requirement. *Colorado v. Bertine* (1987), 479 U.S. 367, 107 S.Ct. 738. Accordingly, an inventory search of a lawfully impounded

vehicle is valid under the Fourth Amendment when it is performed in good faith, pursuant to standardized police procedure or established routine, and when the evidence does not demonstrate the procedure involved is merely a pretext for an evidentiary search of the impounded vehicle. *South Dakota v. Opperman* (1976), 428 U.S. 364, 96 S.Ct. 3092; *State v. Hathman* (1992), 65 Ohio St.3d 403.

Inventory searches serve to protect the owner's property while it is in police custody; protect police against claims concerning lost or stolen property; and protect police and the public against potential hazards posed by the impounded property. *South Dakota v. Opperman, supra*, at 369. An inventory search "must not be a ruse for a general rummaging in order to discover incriminating evidence. The policy or practice governing inventory searches should be designed to produce an inventory." *Florida v. Wells* (1990), 495 U.S. 1, 110 S.Ct. 1632; *State v. Burton* (April 14, 1994), Cuyahoga App. No. 64710, unreported.

Ohio courts have held that if the initial traffic stop was merely a pretext to search for drugs and there was no specific and articulable reason to stop the vehicle to search for drugs, the stop on a pretext of a traffic violation is not permitted; such a stop is a general and unreasonable search that is constitutionally prohibited by both the federal and state constitutions. The test for a pretextual search is whether the police officer under the same circumstances but without the suspicion, would have made the stop. *State v. Spencer* (1991), 75 Ohio App.3d 581, 585. Here the police had a specific and articulable reason to stop the vehicle, an Oldsmobile that had license plates assigned to a Chevrolet.

In a suppression hearing, the state bears the burden of proof and must demonstrate the warrantless search and seizure were reasonable. *State v. Bevan* (1992), 80 Ohio App.3d 126. In justifying a particular intrusion, a police

officer must be able to point to specific and articulable facts which, taken together with reasonable inferences from those facts, reasonably warrant the officer's belief that criminal activity has occurred or is imminent. *Terry v. Ohio* (1968), 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889.

In the present case, the Street Crimes Unit followed appellees vehicle because of its improper license plates and its suspicion that the occupants may be engaged in illegal drug activity. Appellees' vehicle was stopped only after the police determined that the license plates were registered to a vehicle other than the Oldsmobile. And even if it were later learned that Municipal Code 435.04(F) (the city ordinance under which Pierce was ticketed) became temporarily suspended under some other ordinance, that fact would not vitiate the legality of the stop. The officers clearly had probable cause to stop the vehicle. Operating a motor vehicle with fictitious license plates is a serious infraction that warranted the stop, particularly in this era of escalating auto thefts.

In addition, after the initial stop was made, the police determined that the driver, Thomas Pierce, who was not the owner and an admitted fugitive with a fake driver's license, was unable to produce vehicle registration, certificate of title or any other proof of ownership. Nor did a check by police on the vehicle identification number produce any proof of vehicle ownership. Only after all this had occurred did the Street Crimes Unit decide to tow the vehicle and perform an inventory search of the vehicle's contents in accordance with departmental policy.

This court recently addressed a similar issue in the case of *State v. Burton* (April 14, 1994)), Cuyahoga App. No. 64710, unreported. In *Burton*, this court upheld the denial of a motion to suppress evidence where the police initially followed a vehicle based on suspicion that the occupants of the vehicle were engaged in illegal drug

activity. The police did not observe any illegal activity but stopped the vehicle after the license plate was checked and found to be registered to another vehicle as in the present case. This court found that, under the circumstances, any police officer would have been justified in stopping the car "regardless of whether there was a suspicion of drug activity." We held there, as we do here, that the stop was not pretextual and the subsequent impoundment and inventory search of the vehicle were proper.

Similarly, in the case *sub judice*, the record demonstrates that the Street Crimes Unit clearly had probable cause to stop appellees' vehicle. In addition, the fact that appellees were unable to provide them sufficient proof of ownership for the vehicle justified the police officer's subsequent decision to tow the vehicle and conduct an inventory search of its contents.

Appellees maintain that the glove compartment contained a letter from the Ohio Bureau of Motor Vehicles and a copy of the bill of sale for the automobile. The trial court ruled that these documents were present in the glove compartment at the time of the stop based on statements made by Thomas Pierce and Fransheria Cannon even though neither testified that they saw the bill of sale or letter in the car on September 1, 1993, the day of the stop.

The state bears the burden of proof and must demonstrate the warrantless search and seizure were reasonable.

In its findings, the trial court concluded that the state failed to show by a preponderance of the evidence either:

(1) that the vehicle was improperly displaying a particular license. In light of the testimony of Detective Petrovich that he learned through police channels that the Cutlass bore a license assigned to a Chevrolet (and operated by one with a fictitious driver's license and who was not the owner) and carrying a passenger reputed to be

involved with drug trafficking; and admittedly in a high crime area, comprised sufficient justification to warrant a stop. Indeed, in its statement, the lower court conceded that "Before stopping the Cutlass, they (police) learned through the police department computer that the plates on the Cutlass were not registered to that vehicle." or

(2) "that they (police) had made a good-faith effort to determine the validity of the tag *** and after making such a good-faith effort, had reasonable cause to believe that the vehicle was improperly licensed ***."

The police found no evidence of car ownership. When the driver was asked by the (ticketing) officer for identification Pierce produced an Ohio driver license in the name of Robert Hale which Pierce admitted was a fake permit used by Pierce to evade apprehension and extradition resulting from his then status as a fugitive. Pierce had over \$900 in his possession and a pager (to receive calls). Pierce claimed that there was evidence of ownership in the glove compartment without disclosing what that evidence was. Both Detective Petrovich and Walker, singly and separately, searched the glove box and found "some kind of duplication of an application of receipt for a 30-day tag of the State of Ohio." Finding no satisfactory evidence of car ownership or identity of driver, Petrovich followed police procedure by impounding the car to inventory it.

In its decision, the lower court wrote "the police had information which could have led them to calling either the dealer that sold the car, or Mrs. Cannon¹ herself. Those

¹She admitted that had the police informed her that a male (possessing a driver's license of Robert Hale) indicated that she gave him permission to use the car, she would have responded that she did not give such permission and that she did not know anyone by that name.

calls could have confirmed that the license which was on the Cutlass had been properly placed there in a good faith effort to conform to the law. All of this could have been by radio contacts while the police were at the scene and before the Cutlass was impounded and searched." (Footnote added).

Thus the court sought to impose a duty upon the police as an alternate to impoundment, an issue given attention by the Supreme Court in *Colorado v. Bertine* (1987) 93 L.E.2d 739. The court rejected the idea that the Fourth Amendment mandates the police to prove alternates to impoundment to a vehicle owner. The court explained that "reasonable police regulations relating to inventory procedures administered in good faith satisfies the Fourth Amendment, even though courts might as a matter of hindsight be able to devise equally reasonable rules requiring a different procedure." *Id.* at 747. The court reasoned, that while offering the owner or operator, an alternate was entirely possible, it was not required by the Constitution; and in fact, that approach may not address the legitimate interests of protecting the police, the property or the community.

In short the trial court was applying erroneously its own standard of review, as opposed to determining whether the detectives had probable cause to seize and inventory the vehicle. "In dealing with probable cause *** we deal with probabilities. These are not technical, they are the factual and practical consideration of everyday life on which reasonable and prudent men, not legal technicians act." *Brinegar v. United States* (1949), 338 U.S. 160; *Carroll v. United States* (1925), 267 U.S. 132, 164. In issuing its conclusions of law and fact, the trial court imposed its own procedure over that of the officers. To the extent that the court relied on its alternatives to impoundment, its findings are not warranted.

As the court stated in *Illinois v. Gates* (1983), 462 U.S. 229, 230, 231.

The evidence thus collected must be seen and weighed not in terms of arbitrary analysis by scholars, but as understood by those versed in the field of law enforcement.

From this array of evidence, we find included below that the search and seizure was reasonable in the instances that follow:

1. On September 1, 1993 that a Cutlass Oldsmobile, operated by Thomas Pierce, was traveling south on East 71st (toward Superior), a high crime area.

2. The Oldsmobile carried a driver and two passengers: Nathaniel Flowers (in the front passenger seat, hence easily seen) and Napoleon Durden (in the rear seat).

3. Nathaniel Flowers was recognized by Detective Walker (who grew up with Flowers) of the Street Crimes Unit whose major intent is to enforce the state's drug laws. Flowers was reputed to be involved in drug transactions.

4. The officer followed the Oldsmobile and, en route, learned through police department computer that the plates on the Cutlass were registered, not to the 1987 Cutlass, but to a 1985 Chevrolet, thus raising the possibility of a stolen vehicle.

5. The driver of the car identified himself as Thomas Pierce (whose occupation was not revealed) who possessed over \$900 in cash and a pager (to receive messages).

6. When an officer approached Pierce for identification, he produced an Ohio driver's license issued to Robert Hale and informed the unit that he had won a motion to quash evidence -- before.

7. After the officer issued a ticket to Robert Hale for improper plates, Pierce disclosed that the Hale license was fictitious and used by Pierce to evade his apprehension

and extradition as a current fugitive from Pennsylvania.

8. In lieu of Pierce's explanation of the Hale license, Pierce was operating a vehicle in Ohio without a valid Ohio driver's license.

9. When officers asked Pierce about the tags on the Oldsmobile, he told them that he had papers in the glove compartment that would straighten out the whole matter.

10. Detective Petrovich then looked in the glove box and then reported, "the only thing I did see in the glove box was paperwork from a 30 day tag on the car.

11. The officers ran the VIN of the Oldsmobile but it came back NIF (not in file).

12. Detective Walker separately and alone searched the glove box and reported that he found a receipt of some sort for a 30 day tag and a few cassette tapes but no evidence of ownership.

13. After Detective Petrovich and Detective Walker checked the glove box and reported that: (a) there was nothing there to establish ownership² or (b) registration of the vehicle, (c) nor did they know Fransheria was really Pierce's girlfriend or that (d) she gave Pierce permission to use her car, and (e) since the plates did not come back on the car, an inventory was instituted. The inventors [sic] followed proper procedure, which was necessary to protect the police, the property and the community.

Considering all these factors that became part and parcel of the totality of the circumstances, we conclude that the state successfully bore the burden of proof by

²Fransheria testified that her vehicle -- as impounded -- still contained her indicia of ownership; however, the authorities refused to release the car to her without satisfactory evidence of ownership.

demonstrating that the warrantless search and seizure were reasonable. *State v. Bevan* (1992), 80 Ohio App.3d 126.

In the aftermath of the inventory, a loaded gun was found in the vehicle, as well as crack cocaine and cocaine powder discovered in the trunk of the car; all of which were claimed by Pierce.

Accordingly, we sustain appellant's assignment of error that the court erroneously granted defendants' motions to suppress evidence, and reverse and remand for further proceedings.

This cause is reversed and remanded for further proceedings consistent with the opinion herein.

It is, therefore, considered that said appellant recover of said appellees its Common Pleas costs herein.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

NUGENT, J., CONCURS:

BLACKMON, P.J. DISSENTS

(WITH DISSENTING OPINION.)

"s/August Pryatel"
* AUGUST PRYATEL
JUDGE

"s/August Pryatel"
* Judge August Pryatel, Retired Judge of the Eighth Appellate District, sitting by assignment.

N.B. This entry is made pursuant to the third sentence of Rule 22(D), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rules 26). Ten (10) days

from the date hereof this document will be stamped to indicate journalization, at which time it will become the judgment and order of the court and time period for review will begin to run.

COURT OF APPEALS OF OHIO EIGHTH DISTRICT
COUNTY OF CUYAHOGA
NOS. 66853, 66854, 66855

STATE OF OHIO :

Plaintiff-Appellant :

-vs- :

THOMAS PIERCE :
[CASE NO.66853] :

NAPOLEON DURDEN :
[CASE NO.66854] :

NATHANIEL FLOWERS :
[CASE NO.66855] :

Defendants-Appellees :

DISSENTING

OPINION

DATE: MAY 25, 1995

BLACKMON, P.J., DISSENTING:

I respectfully dissent from the Majority Opinion. I fundamentally disagree with the Majority's conclusion that the vehicle inventory in this case was reasonable. A reasonable vehicle inventory exists when police officers follow standardized procedures and do not act in bad faith or for the sole purpose of investigation. *Colorado v. Bertine* (1987), 479 U.S. 367.

Here, the issue is not whether the police used standardized procedure during the inventory but whether it was conducted for the sole purpose of investigation.

Colorado v. Bertine recognizes an inventory may be consistent with standardized police procedure but may be thwarted by pretext and subterfuge. Pretext and subterfuge exist when the police conduct a vehicle inventory for the sole purpose of investigation. Consequently, I would have affirmed the trial court's granting of the motion to suppress. I believe a vehicle inventory conducted to excuse a warrantless search offends the Fourth Amendment and is invalid.

In Ohio an investigatory search disguised as a vehicle inventory is illegal. *State v. Caponi* (1984), 12 Ohio St.3d 302. A vehicle inventory was never intended to act as an excuse or justification for a warrantless search. History tells us that a vehicle inventory has been used exclusively as a police procedure to protect the owner's property, to protect the police from claims by owners, and to protect the police from danger. *South Dakota v. Opperman* (1976), 428 U.S. 304.

Therefore, at least one of the *South Dakota v. Opperman* precepts has to be preponderated by the prosecution to justify a vehicle inventory. *Athens v. Wolf* (1974), 38 Ohio St.2d 237, 241. Here the prosecution claimed the impoundment of the Cutlass was necessary because of the officer's belief that it was stolen. The trial court rejected this claim for lack of proof that the car was stolen and further held the prosecution failed to show that its inventory was conducted in good faith or that the inventory lacked investigative intent. According to the trial court, the police were motivated to impound the vehicle to search for contraband.

It reached this conclusion based on the evidence before the officers at the time of the vehicle inventory.

When the officers questioned the driver at the scene about ownership of the Cutlass, the driver pointed to what later became defendants' Exhibits 1 and 2. These Exhibits

showed the owner of the Cutlass and the owner of the Oldsmobile were the same person. The trial court concluded the license plates belonged to her.

The Exhibits also showed the Cutlass was recently purchased and that the owner, Fransheria Cannon, might have been led by the Bureau of Motor Vehicles to believe she could use the Oldsmobile plates on her new Cutlass. The trial court believed the officers, upon learning of Ms. Cannon, could have called her to see if she wanted her vehicle impounded. A reasonable conclusion by the trial court since not all vehicles are in need of vehicle inventory and impoundment when less intrusive means are available.

As a rule reviewing courts are bound to give great deference to the trial court's finding unless, of course, the finding is unreasonable. An unreasonable factual finding exists when the record is devoid of facts to support the historical fact found by the trial court. The historical facts found by the court were the officers knew the owner of both the Oldsmobile and the Cutlass was the same, knew that the driver had knowledge of her, and knew he claimed to have her permission to use the car. This the court found sufficient to negate the claim that the car was stolen. Without the stolen car justification, the officers are susceptible to the charge that their investigatory intent motivated them to inventory the car.

A pretextual or disguised investigatory search depends upon whether a reasonable police officer confronted with ordinary reasonable suspicion of a minor traffic offense would have chosen under the circumstances to proceed with making an inventory in the absence of an improper motive. A vehicle inventory is pretextual if police use a legal justification for making the inventory to search for evidence of unrelated crimes without probable cause or reasonable suspicion. *State v. Richardson* (1994), 94 Ohio App.3d 501.

In applying the *State vs. Richardson* test to this case, it is certain that, absent the bad motive, a reasonable police officer would have arrested the defendant for no driver's license, allowed the passengers to leave, and informed the owner, Fransheria Cannon, where her car was located.

Moreover, absent the motive to search for drugs, a reasonable police officer would have allowed one of the passengers to operate the vehicle and would have taken the driver into custody for failure to have an operator's license. Every day on the streets of Cleveland this practice is adhered to by the police. It is not a novel idea or some outlandish procedure.

A reasonable police officer would not have concluded the car was stolen when the overwhelming information given at the scene was that the car belonged to Cannon, an acquaintance of the driver. Even if the police chose not to read the letter from the Bureau of Motor Vehicles regarding the owner's license plates, the officer knew Cannon was the owner of both cars from the license plate check.

A reasonable police officer would have accepted the driver's explanation of ownership of the car, would have arrested the driver for no license, and would not have impounded the car for such a minor traffic issue. Unless, of course, the bad motive controlled the officers' conduct.

Here, the officers admitted they pursued the vehicle because one of their fellow officers had said the passenger was a drug dealer. The officers themselves were part of a specialized drug unit whose job was to search for evidence of drugs. Before they pursued the car, the object of their attention was a parked vehicle that they were searching for drugs. These facts lead to but one conclusion - they were searching for drugs when they inventoried the Cutlass. The appellate courts in Ohio have held a vehicle inventory invalid when the state argued the basis for the inventory was because the car might have been stolen and the

testifying officer contradicted the state's offered proof by admitting he was looking for drugs. *State v. Bailey* No. (November 3, 1989), Wood App. No. WD-89-15, unreported. When an officer is motivated by the purpose to investigate under *Colorado v. Bertine* such a motive will taint the vehicle inventory.

Clearly, cases this nature are inherently difficult. Difficult because they often benefit the wrongdoer in ways that make us uncomfortable. However, it is the Constitution that should relieve us of our anxiety. Because it is the Constitution that demands and compels the police to act reasonably. As such, we should all be alarmed when a vehicle inventory is not used to protect property or the police but to furnish the basis for a warrantless search. Accordingly, I would have affirmed the trial court's suppression of the evidence.

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT
COUNTY OF CUYAHOGA
GERALD E. FUERST, CLERK OF COURTS

STATE OF OHIO

Appellant COURT OF APPEALS NO.
66853, 66854, 66855

-VS-

LOWER COURT NO. CP
CR-301570
COMMON PLEAS COURT

THOMAS PIERCE

Appellee MOTION NO. 63588

Date 06/13/95

Journal Entry

MOTION BY APPELLEE FOR RECONSIDERATION IS
OVERRULED.

DONALD C. NUGENT, J., CONCURS

PATRICIA A. BLACKMON, J., DISSENTS

"s/August Pryatel"
Presiding Judge
AUGUST PRYATEL, RET.

were investigating a parked automobile in connection with a suspected drug offense. They saw a different car, the automobile in question in this case, a 1987 Oldsmobile Cutlass, being driven along East 71st Street. All of the officers at that point were out of their own vehicles and either on the side of the street or in the sidewalk area.

Detective Walker, a member of the Street Crimes Unit, noticed that one of the occupants in the Cutlass was the defendant, Nathaniel Flowers, whom he had known since their childhood, and whom he believed in good faith was a person who was involved in the drug trade. That information came from female social acquaintances.

Because of that belief, he alerted his fellow officers. They abandoned what they were doing with respect to the parked motor vehicle, got into their automobiles, and proceeded to follow the Cutlass, which was being driven by defendant Thomas Pierce. Defendant Flowers was a passenger in the front seat, and defendant Durden was in the back seat.

They followed the Cutlass for approximately a half mile to an area near Superior or Addison Road. Before stopping the Cutlass, they learned through the police department computer that the plates on the Cutlass were not registered to that vehicle.

Based on that information, the police stopped the vehicle, ordered all of the occupants out of the car, and proceeded first to search them. The police took Mr. Pierce's wallet out of his pocket and put it on the front hood of the car. They popped the front hood. All of this occurred simultaneously and instantaneously after the car was stopped.

Once the car's occupants were so secured, the police asked Mr. Pierce about the car. Pierce told them that there was identification for the ownership of the car in the car's glove compartment. He gave them the name of the car's

owner--his girlfriend.

Defendant's Exhibit I, which is an envelope, defendants' Exhibit I-1, which is a letter from the Ohio Bureau of Motor Vehicles, and defendants' Exhibit I-2, which is the purchaser's copy of the bill of sale for the vehicle, all were in the glove compartment.

Those items were secured by the car's owner in the routine course of purchasing the automobile two weeks before, on August 17, 1993.

Exhibit I-1 is a letter from Mitchell J. Brown, registrar, motor vehicles, sent to Southland Chevrolet, 2810 Bishop Road in Willoughby Hills. The Court infers from these documents that they were all given to Fransheria Cannon at the time she purchased the Cutlass on August 17th and that she believed that such documentation was satisfactory evidence that she was entitled to operate this car with the plates from her prior motor vehicle.

The police apparently did not care to look at this information. They had information from their computer that registration of the license plates had not been officially transferred to this car. So they proceeded then to search the Cutlass in the way that has been described by the State's witness and to find drugs and a gun.

The gun was not out in the open but under the floor mats as described by Mr. Pierce.

It is clear to the Court that the suspected traffic violation -- driving with allegedly improper plates -- was used as a justification for stopping and searching the vehicle and its occupants, although the primary police purpose was to search for illegal drugs. The investigation began because the defendant, Nathaniel Flowers, was a drug suspect and not because the police were intent on enforcing the motor vehicle laws.

The State has not demonstrated by a preponderance of the evidence, however, that the Cutlass was improperly

licensed. Indeed, R.C. §4503.12(C) and the documents found in the car's glove compartment suggest that the owner, Ms. Cannon, may have been fully entitled to display the plates from her previously owned vehicle on the recently purchased Cutlass.

The evidence that the police possessed at the time of the search was inadequate to resolve whether the Cutlass was improperly licensed. A check of the car's VIN number simply showed "NIF," no information in the police's computer. At the same time, the police had information which could have led them to calling either the dealer that sold the car to Ms. Cannon or Ms. Cannon herself. Those calls could have confirmed that the license which was on the Cutlass had been properly placed there in a good-faith effort to conform with R.C. §4503.12(C). All of this could have been by radio contact while the police were at the scene and before the Cutlass was searched.

The credible evidence does not indicate that the police were investigating a possibly stolen car or, indeed, that they believed at the time that the Cutlass was probably stolen. The evidence is abundantly clear that the police believed they were on the trail of drug traffickers and that they were using the possibility of a motor vehicle violation as a basis for seizing and searching the Cutlass.

But the burden is on the State to demonstrate by a preponderance of the evidence either that the vehicle, at the time, was improperly displaying a particular license tag or that they had made a good-faith effort to determine the validity of the tag on the vehicle and, after having made such good-faith effort, had reasonable cause to believe that the vehicle was improperly licensed or stolen. Cf. *State v. Caponi* (1984), 12 Ohio St. 3d 302. Since the State has not demonstrated any of those essential factors by a preponderance of the evidence, the motion to suppress should be granted. Cf. *Ybarra v. Illinois* (1979), 444 U.S.

85.

The motion to suppress is granted. Trial is set for February 9, 1994 at 9:00 a.m.

"s/Burt W. Griffin"

BURT W. GRIFFIN, JUDGE

DATE: JANUARY 26, 1994

NOTICE OF SERVICE

A copy of the foregoing Ruling was sent by Ordinary U.S. mail this 26th day of January, 1994, to: David C. Sheldon, Esq., Assistant County Prosecutor, The Justice Center, 1200 Ontario Street, Cleveland, Ohio 44113; James R. Willis, Esq., Suite 350, Courthouse Square Building, 310 Lakeside Avenue, N.W., Cleveland, Ohio 44113; Donald Butler, Esq., 75 Public Square, Cleveland, Ohio 44113.

"s/ Burt W. Griffin"

BURT W. GRIFFIN, JUDGE